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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 228

NYE & NISSEN (a Corporation), and ABRAHAM MONCHARSH,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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INTRODUCTION.

The brief filed in opposition to the Petition for Writ of Certiorari in the above-entitled cause compels a reply for the substantial reason that the vital questions of law which are raised in the decision and opinion of the Circuit Court of Appeals for the Ninth Circuit are obscured or avoided therein. Apart from any factual consideration of the record in this case, there are special and important issues of law which we have raised in our Petition for Certiorari and

which, in our view, the Government has failed to meet. Thus, the clear-cut question of the application or non-application of the Pinkerton principle to the substantive counts in this case, which is the very foundation of the affirmance by the Court of Appeals of the conviction of Moncharsh on those counts has been by-passed in the brief for the United States by a resort to an approach which is not sustainable; an approach which was not taken by the Government in the Circuit Court of Appeals, but quite identical with the technique employed in the trial court. In addition, the permitting of the jury to consider evidence of offenses similar to those charged in the substantive counts for the purpose of determining the intent with which petitioner Moncharsh committed the charged substantive offenses where there was no evidence whatever to bring him within the orbit of any of them either as an actor or abettor is likewise treated in a fashion likely to create a misapprehension on the part of this court of the proper question involved, as we understand it.

It is not felt necessary to further enlarge upon the import of the lower court's decision upon future conduct of federal criminal prosecutions. We believe that it will be readily agreed that the judicial extension and enlargement of the Pinkerton principle, as found in this case, will necessarily affect the future administration of criminal justice in our federal courts. Without reflecting on the equal importance of the other issues involved in our Petition for Certiorari, we do feel constrained to comment that the Pinkerton principle as misapplied here raises a compelling invitation to this court to review the decision of the Circuit Court of Appeals. And by reason of its import the Pinkerton principle as raised in this case ought to be squarely faced by the Government.

ANALYSIS OF OPPOSING QUESTIONS PRESENTED.

It is apparent that on the face of the Government's brief that Petitioners and the Government are at a distinct variance with respect to the "questions presented." When laid

side by side, the issues outlined by the Government in its first two questions presented are immediately recognized as being distinctly different in character and connotation than those raised by our Petition.

Petition for Certiorari	*Government Brief in Opposition*
1. May the doctrine of vicarious liability as set forth in *Pinkerton v. United States*, 328 U. S. 640, be employed by an Appellate Court to sustain a conviction on substantive counts following a conspiracy count where the cause was submitted to the jury on a different theory and where the jury was not directed to make findings of fact as to (a) whether the conspiracy was in existence at the time the substantive offenses were committed; and (b) whether the substantive offenses were committed in furtherance of the conspiracy or the object of it?	1. Whether the evidence is sufficient to sustain the conviction of petitioner Moncharsh on the substantive counts, charging the presentation of false invoices to an agency of the United States, as an abettor or procurer of those offenses.
2. Whether evidence of other offenses similar to those described in the substantive counts can be properly considered by a jury for the purpose of determining the intent with which petitioner Moncharsh supposedly committed the substantive offenses where there was no evidence of his participation in any of the offenses or his aiding and abetting thereof on the theory that the doctrine of the	2. Whether the jury were properly permitted to consider in connection with the substantive counts, as evidence of the intent with which the offenses charged therein were committed, proof of similar offenses occurring at about the same time and showing a consistent pattern of conduct.

Pinkerton case imposes liability upon him for their commission, when the substantive offenses were not submitted to the jury on the *Pinkerton* rule, but with specific instructions that evidence of participation or aiding and abetting must be found before a verdict of guilt could be returned.

Question 3 as presented in the Brief for the United States in Opposition (p. 2) is essentially acceptable to Petitioners' view of the case.

The propriety of divergent or adversary viewpoints which may exist between Petitioners and the Government is recognized. Nevertheless, with respect to question 1 as proposed by the Government, we submit that there is no issue at all as to the sufficiency of evidence to sustain the conviction of Moncharsh on the substantive counts. If there had been any evidence whatever upon which that conviction could have been rested, it would not have been necessary for the Government to invoke the Pinkerton principle in the Court of Appeals or for the Court of Appeals to adopt and apply that principle. We cannot conceive of any question arising on the issue of the sufficiency of evidence to sustain the conviction of Moncharsh on the substantive counts when, in fact, there was none. It should be noted that the Government has now here in this court abandoned the position it took in the Circuit Court of Appeals; namely, that the Pinkerton rule was the justification for the conviction of Moncharsh on the substantive counts and the question of evidence with respect thereto was beside the point.

With relation to question 2, as stated in the Brief for the United States in Opposition, the important element omitted in that statement is this; that there was no evidence at all bringing Moncharsh within the orbit of the commission of

the substantive offenses or of any of the so-called similar offenses either as an actor or an abettor. Consequently the issue on this head we submit is quite clearly stated in our Petition for Certiorari under question 2 on page 2 thereof. If the issue were as stated by the Government then quite obviously there would be no substantial question to present to this court at all.

With respect to question 3 as recited by the Government in their brief (p. 2) we take no issue.

COMMENT ON OPPOSITION STATEMENT OF FACTS.

The facts have been set forth in the brief in opposition highlighting the circumstantial evidence given by the witnesses Pineda and Andrade from which an inference of fraudulent conduct on the part of Moncharsh could be drawn by the jury. This court's attention is invited to testimony of Mr. John Smith, the Vice-President of Nye & Nissen, appearing at pages 4226 to 4260 of the record as well as that of Petitioner Moncharsh found at pages 4037 to 4115 of the record which gives a cogent and understandable description of the duties and activities of Moncharsh in relation to the execution of his responsibilities and duties as President of the company which operated some thirteen plants and transacted a tremendous volume of business. The court will further observe that the defendant Menges was acquitted by the jury apparently on the basis that the testimony of Pineda and Andrade was not entitled to belief with respect to him. Menges, like Moncharsh, was placed within the active range of the period 1939 to 1942 only and the entire testimony covering that period of time was given chiefly by Pineda and Andrade.[1]

It is significant that despite the length of the trial, the Government wholly failed to prove one deficient delivery of products from Nye & Nissen to any government agency

[1] The animosity of these two discharged employees toward Moncharsh is apparent throughout their testimony. The difficulty is comprehending much of it is apparent upon an examination thereof.

for the whole period of time covered by these witnesses—not one false voucher was shown.

It should also be noted that the evidence against Moncharsh based on the testimony of these former employees was contradicted by all defendants in the case and by Mr. Smith and other witnesses for the defense.

In connection with the discussion for the proof covering years 1943 and 1944, the Government has merely quoted a paragraph from the opinion of the Circuit Court of Appeals referring to the specific deliveries of commodities to seventeen ships operated by the War Shipping Administration. Admittedly, there was no evidence which could possibly be found in the 4600 page record from which an inference could be drawn that Moncharsh participated in, aided, abetted, counseled, commanded, procured or induced the commission of any offenses with relation to those shipments of merchandise.

We are compelled to further point out that much of the evidence introduced in support of the conspiracy count as well as of the substantive counts in this case was of highly questionable and inflammatory character in that a consistent line of incompetent testimony relating to the subsequent condition of eggs (one of the most perishable of all commodities)[2] was permitted to be considered by the jury as proof of their prior condition. Thus, for example, in connection with a sale of eggs to the S. S. Hawaiian Shipper in December 1944, proof was offered and received that some two weeks after the delivery of the merchandise some of the eggs were found to be inedible. This proof was confined wholly to the conspiracy count (R. 3342). The eggs

[2] Hand, a Government expert, testified that an egg could change from a grade A to a blackrot overnight depending upon conditions of storage and handling (R. 631). Evans, a Government expert, admitted that in order to render an opinion as to the quality of eggs at the time of official inspection it would be necessary for him to see and examine the eggs at that very time (R. 2839-41). Whitmore, a Defense expert, testified that he had seen eggs deteriorate a full grade overnight (R. 4212).

were delivered to the dock on December 5, 1944, and probably remained on the pier for a period of five or six days (R. 1525-6). The ship sailed from San Francisco on December 16, 1944 (R. 1524-5) and over the vigorous objection of the defendants (R. 1513-18) the Government elicited a lengthy and repulsive description of the condition of some of these eggs after the ship was at sea and during the course of the voyage (R. 1518-24, 1547-55, 1592-1600). A motion to strike this testimony (R. 1563-77) was denied (R. 1578). This prejudicial testimony was hammered home to the jury with emphasis on odor and color by Government counsel in their closing arguments (R. 4490-1, 4588-9).

Repetition of this type of evidence is found in connection with the testimony of the Government witness, Mahoney, who was permitted to give a recitation of the vileness of some eggs as found at sea in the first week of May 1944 after delivery was made on April 24, 1944, to the S. S. John Muir, which eggs were officially inspected on April 18, 1944. And again in the case of the S. S. William S. Clark a similar line of testimony is encountered from the witnesses Bradway (R. 2004-26), Able (R. 2027), Wirth (R. 2066), and Rynerson (R. 1966-73). In addition, the testimony of the witness Hand and Evans with relation to the condition of eggs found aboard the merchant vessels in April and May 1944 was also of a similar nature.

Although the defense requested a specific instruction on the subject of the lack of warranty on the part of a vendor such as Nye & Nissen who sold subject to inspection (R. 141-2), the request for instruction was refused.[3] We submit that the irreparable damage wrought by this type of testimony can scarcely be measured save for the observation that is created a false atmosphere which could not fail to influence the minds of the lay jurors. "In these circum-

[3] All of the deliveries of eggs in the two-year period, 1943-1944, complained of when combined constituted less in quantity than the ordinary volume of business handled by the company in one working day.

stances, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States*, 295 U. S. 78, 89. Although challenged in the Court of Appeals below as error, that court dismissed the proposition on the basis of *F. W. Woolworth Co.* v. *Seckinger* (C. C. A. 5, 125 F. 2d 97, 98), a case not at all in point for the reason that the holding there related to the subsequent condition of a floor in an office building which is scarcely comparable to the perishable quality of a chicken embryo.

REPLY TO GOVERNMENT'S ARGUMENTS.

We propose to briefly discuss the error in the Government's argument in support of its request for denial of the petition (see Br. in Opp. pp. 10-18). Preliminarily we feel it necessary to point out to this court that little comfort ought to be drawn by the Government from the fact that petitioner Moncharsh has not questioned the sufficiency of the evidence tending to establish his conviction on the conspiracy count in this court. His conviction is challenged in his contention that there was a prejudicial and fatal variance between the conspiracy charged in the indictment and the evidence adduced in its support. We hardly think it necessary to observe that petitioner Moncharsh does not regard the Supreme Court of the United States as a court of error sitting to review matters of evidence; that upon appeal, he, like any other convicted defendant is confronted with the rule that all evidence and inferences therefrom must be taken in the aspect most favorable to the government; that as long as there is some substantial evidence upon which the verdict may be predicated, an appellate court will not reverse, and admittedly, there is some evidence in this 4600 page record from which an inference of misconduct on his part might be drawn by the jury; i.e., purported misconduct in several isolated instances occurring during the years 1939 to 1942. Petitioner could expect to be reminded, if the issue were raised, that on appeal it

matters not that the testimony was seemingly absurd, far fetched, motivated by animus and contradicted in most particulars. In any event, no prejudicial admission of guilt or otherwise can properly be drawn from the fact that the sufficiency of evidence under the conspiracy count is not challenged here by him.

Petitioners do not urge, as the Government seems to believe, that "the evidence is insufficient to sustain his (Moncharsh's) conviction on the six substantive counts, charging him and his co-defendants with knowingly presenting false invoices to an agency of the United States . . . " (Br. in Opp. p. 10). As the petition quite plainly sets forth, we urge that the Pinkerton rule has been misapplied by the Circuit Court of Appeals below to hold Moncharsh guilty for substantive crimes.

That the Pinkerton case is the foundation upon which the Circuit Court of Appeals has rested its affirmance of the conviction of Moncharsh on the substantive counts is eminently clear upon a reading of that court's opinion. There it is stated that:

> "Since the evidence justifies a finding that the substantive offenses which are the subjects of Counts II through VII were committed in furtherance of a continuing conspiracy of which Moncharsh was a member, it should follow that the evidence is also sufficient to support a finding of Moncharsh's guilt on those counts under the rule in Pinkerton v. United States, 328 U.S. 640. Appellant Moncharsh does not contend that he had withdrawn from the conspiracy before the substantive offenses were committed, but seeks to avoid the force of the Pinkerton case on other grounds . . .
>
> "Whatever the answer to this problem may be, we are of the opinion that the verdict of the jury on the substantive counts did not disregard or go beyond the scope of the instructions given. Appellants' contention to the contrary is answered by the Pinkerton case itself.
>
> "So long as the conspiracy existed, the members acted for each other in carrying it forward. The criminal intent to commit substantive offenses in furtherance of

> the unlawful project was established by the formation of the conspiracy. 'Each conspirator *instigated* the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. *The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.*' (Emphasis supplied.) Pinkerton v. United States, 328 U. S. 647." (R. 4616, 4618)

As noted supra it was in the Circuit Court of Appeals that the Government urged the Pinkerton rule as the justification for the conviction. Now, however, the legal approach adopted by the Government is quite evidently based upon a different technique. The Pinkerton rule is abandoned and the action of the Circuit Court of Appeals in applying it is now said to be unnecessary to examine for the reason that there was sufficient evidence upon which the jury could convict Moncharsh as an aider and abettor of the substantive offenses without regard to the Pinkerton rule. If there were any evidence of aiding and abetting on the part of Moncharsh, it could be quite clearly pointed to. What the Government apparently believes to be evidence of aiding and abetting on the part of Moncharsh of the filing of false vouchers in April and May 1944 is this: that he was President of the company, a shareholder in it, and that there was some testimony given by two former employees that some *two years* before these false vouchers were filed with the War Shipping Administration, Moncharsh assisted in the transfer of eggs from one box to another in connection with a so-called Army order, that he made statements and performed other acts from which an inference of fraudulent conduct could be drawn. There was never anything but this circumstantial evidence adduced by the government tending to show that Moncharsh participated in an unlawful conspiracy to defraud the United States. There was no evidence of any activity on his part from which an inference of fraudulent conduct

could be drawn *after 1942*. The false vouchers were filed in April and May 1944 with the War Shipping Administration, which agency of the government was brought into this case only during that period following 1942. There is no evidence at all to show a purposive attitude on the part of Moncharsh toward the filing of the false vouchers as charged in the substantive counts, nor is there any evidence that he furthered or assisted the transactions, that he knew the crimes were in the process of commission or that he acted in any manner with an attempt to aid or abet them. Thus, the fact that Moncharsh did something in 1942 with respect to an Army or Navy shipment while significant for purposes of proving a conspiracy, cannot be employed, in our view, for the purpose of proving aiding and abetting of a distinct and separate criminal transaction occurring two years later. (See *United States* v. *Peoni*, 100 F. 2d 401, 402; *Bozza* v. *United States*, 330 U. S. 161, 167-169 (1947) (Dissenting Opinion).[4]

The fact that Moncharsh was an officer of the company was one to which the jury was specifically told they should attach no improper significance.

> "I instruct you in connection with counts two to seven, inclusive, that the mere fact that one is an officer or employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment." (R. p. 4366)

The lack of any direct proof of the complicity of Moncharsh in the presentation of false invoices or indirect proof of aiding and abetting thereof is sought to be overcome by the employment of the presumption that the substantive

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[4] Similarity of the present technique of the Government and that court is striking. See Appendix A, Petition, pp. 25-26.

offenses were in fact committed in furtherance of the conspiracy charged in the indictment. That is the basic fallacy in the Government's argument and is a repetition of the error inherent in the Circuit Court of Appeals opinion in this case. Thus we find in the brief in opposition the statement that " . . . the substantive offenses were plainly in furtherance of the conspiracy charged in the first count, . . . " (Br. in Opp. p. 13, ftn. 4) We deny the right or the justification for the Government or the Circuit Court of Appeals to assume that to be a fact unless and until a jury makes a finding to that effect. A different case might exist if the conspiracy could not be proved without concomitant proof of the commission of the substantive offenses or the substantive offense, e.g., where the conspiracy was to commit offenses against the United States and the only overt acts were the commission of those offenses. But this is not the case here, for in the instant case the jury could properly find that a conspiracy existed without regard to or consideration of the substantive offenses at all (see Petition, pp. 20-23). Cf. *Sealfon* v. *United States*, 332 U. S. 575 (1948). Consequently, there is no justification for the Government to assert that the substantive offenses were plainly in furtherance of the conspiracy charged in the first count, or that they were "pieces in the whole pattern." (Br. in Opp. pp. 12, 13). That vital fact imposing constructive guilt upon petitioner Moncharsh should not be academically assumed by the prosecution or court where his liberty and property hang in the balance. To countenance such procedure would be to permit the presumption to override the constitutional right of the petitioner Moncharsh to have that vital fact considered and weighed by the jury in accordance with due process of law.

To summarize, the gist of the Government's argument is that because there was some circumstantial evidence from which an inference of fraudulent conduct on the part of Moncharsh could be drawn with relation to Army and Navy orders during the years 1939 to 1942, it follows that this evidence is sufficient to prove that he aided and abetted the

filing of false vouchers in April and May 1944 with the War Shipping Administration. To repeat, if there were any evidence upon which Moncharsh could be convicted as an aider and abettor or a participant in the substantive counts, it would not be necessary for the Pinkerton rule to be introduced in this case at all as it was by the Government in the Circuit Court of Appeals where it was adopted. Leaving out the Pinkerton rule brings in the necessity for some substantial evidence of his aiding and abetting the substantive offenses upon which the jury's verdict could be founded in accordance with the trial court's instruction. One may look in vain for that evidence in this voluminous record.

In addition to its reliance upon the Pinkerton rule for the conviction of Moncharsh on the substantive counts, the Circuit Court of Appeals also employed it to sustain the action of the trial court in considering evidence of other similar offenses in determining the guilt or innocence of Moncharsh. That action we have challenged and raised in question 2 in our petition (Pet. 2). The Circuit Court of Appeals employed the Pinkerton rule in the following manner:

> "During the trial, evidence was admitted which tended to show the commission of numerous prior offenses similar to those charged in the substantive counts of the indictment. As we have already indicated, this evidence was admissible against Moncharsh under Count I to show the continuance of the conspiracy of which he was a member. Appellants contend, however, that the trial court erred in allowing the jury to consider this evidence under the substantive counts for the purpose of determining the intent with which each defendant committed the acts charged in those counts.
>
> "Proof of the substantive counts required, as the trial court instructed, proof of a specific intent to defraud the United States. It is settled law that similar offenses may be admissible to show such intent. Tedesco v. United States (CCA 9), 118 F. 2d 737. Specifically, the argument made here is that the prior similar offenses cannot be considered as evidence of

Moncharsh's guilt under the substantive counts, since Moncharsh was not shown to have had any connection with them. This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in furtherance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. Pinkerton v. United States, 328 U. S. 640." (R. 4627-28)

It is contended by the Government that the jury was properly permitted to consider this evidence of offenses similar to those charged in substantive counts in determining whether petitioner Moncharsh intended to commit the substantive offenses. Again, it must be borne in mind that there was no evidence of any character that Moncharsh committed either the substantive offenses or the so-called other offenses, or that he aided or abetted their commission. It would seem that the rule of law as proposed by the Government (*Weiss* v. *United States*, 122 F. 2d 675, 681-685 (C.C.A. 5)) is a correct statement of the general rule which ordinarily governs the admission of evidence of other offenses for the purpose of showing the lack of accident on the part of a defendant and appropriately employed for the purpose of demonstrating criminal intent. What the Government apparently fails to consider is that in the *Weiss* case and authorities cited therein, the commission of the crime charged in the indictment was proved as to the particular defendant against whom the evidence was offered and further that the particular defendant had some connection with the so-called "other offenses" which were introduced for the purpose of showing that he pursued a consistent pattern of conduct and hence intended to commit the crime charged in the indictment. Those conditions are lacking in this case.

It must be repeated again that there is no evidence in the 4600 page record which brings Moncharsh within the orbit

of the commission of the substantive crimes or the similar offenses. That fact was recognized by the Circuit Court of Appeals which employed the Pinkerton case as the basis for holding that the trial court properly permitted the jury to consider this evidence in determining the guilt of Moncharsh under the substantive counts because the Circuit Court of Appeals felt that there was "evidence indicating that Moncharsh participated in a conspiracy, *in furtherance of which the acts charged in the substantive counts and the prior offenses were committed.*" (Italics ours) That reasoning is adopted by the Government in this Court. (Gov. Br. in Opp. p. 14) However, the underlying premise of this contention is predicated upon the conclusion that the substantive offenses as well as the so-called "other offenses" were committed in furtherance of the conspiracy and that Moncharsh was a member of the conspiracy at the time of their commission. It is those essential facts which must be found by a jury before Moncharsh could be held even as an aider or abettor of the substantive offenses, as we have demonstrated supra. The assumption of such a conclusion is not justified whether engaged in by the Circuit Court of Appeals or by the Government in this court. We feel that Moncharsh had a right to have that finding made by the jury on proper instruction rather than to be victimized by surmise and suspicion that necessarily influenced the jury's verdict as to him on the substantive counts. As is true of the reasoning of the Circuit Court of Appeals with respect to his guilt on the substantive counts, the Pinkerton rule has been employed also by it to justify the error of the trial court which naturally gravely affects the constitutional rights of petitioner Moncharsh.

We feel that the question presented in our petition pointing out the fatal variance between the allegations of the indictment and the proof in respect of the conspiracy count is not refuted by the Government. Although it is contended that there is no basis for inferring that Moncharsh was not a party to the filing of false invoices with the War Shipping Administration the government advances no persua-

sive facts or argument in support of that gratuitous assertion. One cannot fail to be impressed with the fact that any mention of Moncharsh by prosecution witnesses is entirely missing for the whole period of time covered by the War Shipping Administration transactions. And while the unique testimony of the principal prosecution witnesses Pineda and Andrade circumstantially attributed misconduct on his part with Army deliveries, nevertheless the Army purchased and received tremendous quantities of merchandise during all the period of time covered by the War Shipping Administration without a single complaint—without one iota of evidence in the record of any fraudulent conduct on the part of any of the defendants in these sales.[5] We reiterate that a fatal variance exists which requires the reversal of this entire case.

We note that the Government has given short consideration to question 4 raised in our petition (Gov. Br. in Opp. pp. 17-18, ftn. 6). We submit that the fact that the point was not raised prior to trial or during the course thereof is of no persuasive value here. The indictment is defective for the reason set forth in our petition and as a plain error of a fundamental nature it may be noticed anytime on appeal.

CONCLUSION.

In the light of the foregoing discussion, we respectfully submit that the Petition for Writ of Certiorari be issued.

Respectfully submitted,

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Dated: October 8, 1948

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[5] It is significant that in April and May 1944—the time covered by the substantive counts the Army was purchasing and receiving approximately 1800 cases of eggs a week from Nye & Nissen without complaint. (R. 609)